In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 902

MICHAEL V. SCIORTINO, PETITIONER

v.

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The relevant facts are undisputed and are set forth in the opinion of the court of appeals (Pet. App. 1–7). Petitioner, a Connecticut physician, was arrested on June 22, 1967, upon a commissioner's warrant charging him with the unlawful sale of depressant and stimulant drugs, in violation of 21 U.S.C. (Supp. II) 331(q), 360a(b). He was immediately brought before the commissioner and admitted to bail. A preliminary hearing was postponed until July 11 at the request of petitioner's counsel. On July 10, the respondent District Judge denied petitioner's motion to enjoin the United States Attorney from presenting the case to the federal grand

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jury, and later that day the grand jury returned an indictment. On July 11, the commissioner continued the preliminary hearing until July 24 and issued a subpoena directed to the government's principal witness. On July 24, respondent granted the government's motion to quash the subpoena, and the commissioner adjourned the hearing. Petitioner thereafter filed a motion for a writ in the nature of mandamus in the United States Court of Appeals for the Second Circuit requesting that the district court be directed to provide petitioner with a preliminary hearing. The motion was denied on November 3, 1967.

The single issue in this case is whether petitioner had a right to a preliminary hearing notwithstanding the fact that a grand jury indictment had been returned. The decision of the court of appeals is correct, and there is no occasion for further review by this Court. The courts of appeals which have considered the question, with the exception of the District of Columbia Circuit, have unanimously held that the purpose of a preliminary hearing under Rule 5(c), F.R. Crim. P., is to determine whether there is probable cause to believe that the defendant committed the charged offense, and that the return of an indictment thus obviates the need for a hearing. *E.g., United States* v. *Aiken*, 373 F. 2d 294 (C.A. 2), certiorari denied, No. 94, this Term (October 9, 1967); *United States ex rel. Dale H. Synder* v. *Turley*, C.A. 3, No. 16479, affirmed without opinion March 9, 1967, certiorari denied, No. 315, this Term (October 9, 1967);

United States v. *Chase*, 372 F. 2d 453, 467 (C.A. 4); *Vincent* v. *United States*, 337 F. 2d 891, 896 (C.A. 8), certiorari denied, 380 U.S. 988; *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970. This Court recently intimated its agreement with that position in *Jaben* v. *United States*, 381 U.S. 214, 220.

Petitioner contends that the decision below is in conflict with the District of Columbia Circuit's holding in *Ross* v. *Sirica*, 380 F. 2d 557 (C.A.D.C.), that the return of an indictment does not cure defects in the preliminary hearing procedure. See also *Blue* v. *United States*, 342 F. 2d 894 (C.A.D.C.), certiorari denied, 380 U.S. 944. He argues that the District of Columbia Circuit has recognized that the preliminary hearing is intended to afford a defendant an opportunity to discover the government's case, which is not satisfied by the return of an indictment. However, as we pointed out in our Memorandum in Opposition in *Snyder*, *supra*, the state of the law in the District of Columbia on this issue is far from clear. In *Crump* v. *Anderson*, 352 F. 2d 649 (C.A.D.C.), decided after *Blue* but before *Ross*, a panel of the court of appeals reached a result opposite from that in *Blue* and *Ross*. In the *Ross* case, the government's petition for a rehearing *en banc* was denied *per curiam* by a 5–4 vote. Most of the judges filed separate statements which indicated that a majority of the court rejected the view that the preliminary hearing has an independent "discovery" function which would require that

a hearing be held after an indictment had been returned.[1]

The particular facts of the *Ross* case, moreover, raise some doubt whether the decision stands for the broad proposition, urged by petitioner, that a timely request for a preliminary hearing, notwithstanding a supervening grand jury indictment, must always be granted to facilitate defendant's discovery of the government's case (Pet. 6–7). The defendant in *Ross* was charged with a capital offense. After denying defendant's motion for the issuance of subpoenas for the government's three eye-witnesses to the crime, the commissioner found probable cause at the preliminary hearing on the basis of a police officer's hearsay testimony concerning statements which those witnesses had made to him, and continued the defendant in custody. An indictment was returned two months later, and subsequently the district court denied defendant's motion to remand the case for a preliminary hearing at which the government's three eye-witnesses could be subpoenaed and examined.

On defendant's motion for a writ in the nature of mandamus, the court of appeals ordered the case remanded for a second preliminary hearing (Pet. App. 9a–10a, 18a–19a). Viewed in this context, the decision of the court of appeals may reasonably be

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[1] The majority voting to deny the government's petition for rehearing *en banc* was comprised of the panel which decided *Ross* (including Judge Fahy, since retired) and Judges McGowan and Leventhal, who stated that the case was not appropriate for clarification through rehearing. (Pet. App. 17a–25a.)

interpreted as holding merely that a defendant who may be faced with prolonged detention as the result of a finding of probable cause at a preliminary hearing must be afforded an adequate opportunity to test the evidence on which that finding is based. The ambiguity of the *Ross* decision is further demonstrated by the fact that the panel which ordered the case remanded for a hearing did not indicate whether the commissioner would again have the responsibility of determining probable cause or what effect a finding of no probable cause would have on the existing grand jury indictment (Pet. App. 30a, 32a n.2 (Statement of Circuit Judges Burger and Tamm on Votes to Grant Rehearing *En Banc*)). In the absence of further clarification by the entire court of appeals on the question involved in the present case, it cannot fairly be said that there is a conflict warranting resolution by this Court.

In any event, the allegedly conflicting decisions fall within the special province of the Court of Appeals for the District of Columbia to fashion rules for its circuit. Whatever justification there may be for recognizing the utility of the preliminary hearing as a discovery device in connection with the type of local crimes falling within the jurisdiction of the District of Columbia, there is no basis on which to extend that concept to other federal circuits at this time. Indeed, as reported in the findings of the Senate Subcommittee on Improvements in Judicial Machinery, the preliminary hearing stage is generally unsuitable for

discovery purposes (113 Cong. Rec. S1885 (daily ed., February 9, 1967)).[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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[2] Petitioner's argument (Pet. 8–9) that the Constitution requires that a preliminary hearing be held for purposes of "discovery" is without merit. Although we agree, as he states, that it is constitutionally imperative that an accused be provided with counsel at the preliminary hearing, it does not follow that the Constitution requires that hearing in all events.

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